Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Emmis Radio License Corporation	)	File No. EB-01-IH-0315, EB-01-IH-0357,
	)	EB-01-IH-0409
Licensee of Station WKQX(FM),	)	Facility ID # 19525
Chicago, Illinois	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 2002 **Released:** August 2, 2002

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we dismiss as untimely David Edward Smith's request for reconsideration of two decisions issued January 28, 2002 and January 29, 2002, denying his indecency complaints against WKQX(FM), Chicago, Illinois.[1] In addition, we deny Mr. Smith's request for reconsideration of a third decision issued February 5, 2002 denying his indecency complaint against WKQX(FM).

II. BACKGROUND

2. The Commission received three complaints from Mr. Smith alleging that WKQX(FM) broadcast indecent material on April 23, 2001, May, 2, 2001, May 10, 2001 between 8:00 a.m. and 8:35 a.m. during the "*Mancow's Morning Madhouse*" ("*Mancow*") program. Mr. Smith submitted tapes of the *Mancow* program containing the allegedly indecent material broadcast on these dates. WKQX(FM) broadcast on-air discussions about "Viacreme," a product that is designed to improve a female's sexual response and performance. We denied Mr. Smith's complaints, finding that the complained of material is not patently offensive as measured by contemporary community standards for the broadcast medium. Mr. Smith filed a consolidated appeal of our denial of these complaints, which Emmis opposed.[2]

[1] Our January 28, 2002 letter denied Mr. Smith's indecency complaint based on material aired on May 10, 2001. EB-01-IH-0409. Our January 29, 2002 letter denied Mr. Smith's indecency complaint based on material that aired May 2, 2001. EB-01-IH-0357. Our February 5, 2002 letter denied Mr. Smith's indecency complaint based on material that aired April 23, 2001. EB-01-IH-0315.

[2] Mr. Smith's pleading states that he is appealing the denial of these three complaints and is directed to the Investigations and Hearings Division of the Enforcement Bureau, which issued the denials. For this reason, we will treat his appeal as a petition for reconsideration. *See* 47 C.F.R. § 1.106(a)(1).

3. ***January 2002 Letters.*** Mr. Smith had 30 days from the dates of the January 2002 letters to request reconsideration of those decisions. The 30-day period for requesting reconsideration is a statutory requirement and is set forth in Section 405 of the Communications Act of 1934, as amended (the "Act").[3] 47 U.S.C. § 405. *See also* 47 C.F.R. § 1.106(f), which implements section 405 of the Act. The Commission has consistently held that it has no authority to waive or extend this statutory period, even for as little as one day, absent extraordinary circumstances, which Mr. Smith has not demonstrated.[4] Because Mr. Smith's request for reconsideration was filed on March 1, 2002, more than 30 days from the dates of both the January 2002 letters, it is untimely and will be dismissed with respect to the complaints denied in those decisions. However, Mr. Smith's request for reconsideration of our February 5, 2002 letter was filed within the 30 day period for requesting reconsideration, and we will address the merits of his request with respect to the denial of his indecency complaint for material that aired on April 23, 2001.

III. DISCUSSION

4. ***February 2002 Letter***. As we noted in our February 5, 2002 decision, it is a violation of federal law to broadcast obscene or indecent programming. *See* 18 U.S.C. § 1464. Congress has given the Federal Communications Commission the responsibility for enforcing section 1464. Although the federal courts have held that indecent speech is protected by the First Amendment,[5] the federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent speech, as well as the Commission's interpretation and implementation of the statute.[6] However, the First Amendment is a critical constitutional limitation that demands we proceed cautiously and with appropriate restraint.[7]

[3] *See* 47 U.S.C. § 405, which requires a petition for reconsideration to be filed within thirty days from the date of public notice of the Commission's action. Here, because our denial letters were not published in the Federal Register, were not released to the public, and were not announced in a public notice, the date appearing on the letters is the date of public notice. *See* 47 C.F.R. § 1.4(b)(5).

[4] The exception for "extraordinary circumstances" is a narrow one, and applies when the Commission fails to follow its procedural rules for providing notice of its decision. *See Gardner v. FCC,* 530 F.2d 1086, 1091 (D.C. Cir 1976). Mr. Smith did not allege that there was defective notice that made it reasonably impossible for him to meet the filing deadline for requesting reconsideration with respect to the January 2002 decisions. *See, e.g., Adelphia Communications Corporation*, 12 FCC Rcd 10759, 10760 note 9 (1997), *citing Gardner*, 530 F.2d at 1091-92 note 24.

[5] *Sable Communications of California, Inc. v. FCC,* 492 U.S. 115 (1989).

[6] *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978). *See also Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*"); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert denied*, 112 S.Ct. 1282 (1992) ("*ACT II*"); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert denied*, 116 S.Ct. 701 (1996) ("*ACT III*").

[7] *ACT I*, *supra* note 6, 852 F.2d at 1344 ("Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people say and hear."). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

Consistent with a subsequent statute and case law,[8] under the Commission's rules, no radio or television licensee shall broadcast obscene material at any time, or broadcast indecent material during the period 6 a.m. through 10 p.m. *See* 47 C.F.R. § 73.3999.

5. In enforcing its indecency rule, the Commission has defined indecent speech as language that first, in context, depicts or describes sexual or excretory organs or activities. Second, the broadcast must be "patently offensive as measured by contemporary community standards for the broadcast medium." *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (*citing Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). This definition has been specifically upheld by the federal courts.[9] The Commission's authority to restrict the broadcast of indecent material extends to times when there is a reasonable risk that children may be in the audience. *ACT I, supra*. As noted above, current law holds that such times begin at 6 a.m. and conclude at 10 p.m.[10]

6. We evaluated Mr. Smith's complaint and applied the standards developed through Commission case law and upheld by the courts. *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency* ("*Indecency Policy Statement*"), 16 FCC Rcd 7999, 8015 ¶ 24 (2001). Specifically, in determining whether the on-air discussion of Viacreme was patently offensive, we considered the record in light of three factors that are particularly relevant: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock. *See Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10. Based on this analysis, we concluded the discussion of Viacreme was not patently offensive. In this regard, we found that even though the sexual references concerning the use of Viacreme were explicit and repeated, in context, the presentation of this material was not pandering and does not appear to have been used to titillate or shock. The broadcast is similar to other material with explicit sexual references that nevertheless were not pandering or used to titillate or shock.[11] Thus, we determined that, in context, the on-air discussion of Viacreme was not patently offensive as measured by contemporary community standards.[12]

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[8] Public Telecommunications Act of 1992, Pub. L. No. 356, 102nd Cong., 2nd Sess. (1992); *ACT III, supra* note 6.

[9] In *FCC v. Pacifica Foundation, supra,* the Court quoted the Commission's definition of indecency with apparent approval. *FCC v. Pacifica Foundation, supra*, 438 U.S. at 732. In addition, the D.C. Circuit Court of Appeals upheld the definition against constitutional challenges. *ACT I, supra* note 6, 852 F.2d at 1339; *ACT II, supra* note 6, 932 F.2d at 1508*; ACT III, supra* note 6, 58 F.3d at 657.

[10] *ACT III*, *supra* note 6.

[11] *Compare Indecency Policy Statement* 16 FCC Rcd at 8011-12, and cases cited therein with *Citicasters Co.*, 15 FCC Rcd 19095 (EB 2000)(forfeiture paid)(discussion of sexual techniques lead by sex therapist, which included comments such as "oh yeah, baby" is pandering and titillating and therefore patently offensive).

[12] We also found that the program's introduction contains fleeting and isolated remarks that do not warrant Commission sanction, particularly in light of the overall context of the on-air discussion of Viacreme which followed. *See, e.g., L.M. Communications of South Carolina, Inc.(WYBB(FM))*, 7 FCC Rcd 1595 (MMB 1992).

7. In seeking reconsideration, Mr. Smith challenges our conclusion that the sexual references in the on-air discussion of Viacreme, in context, were not pandering or used to titillate or shock. Mr. Smith asserts that the *Mancow* program is not about providing useful information, but "survives on its shock value, which is often pandering and titillating." Moreover, in Mr. Smith's view, we "refuse[d] to act because each broadcast was examined individually, rather than being considered as part of the larger and continued situation." In this regard, Mr. Smith argues that we should consider "the entire history and context of the program's broadcasts in question."

8. We find that Mr. Smith's arguments fail to demonstrate any error of law or fact that would warrant reconsideration. *See* 47 C.F.R. § 1.106(d). Any consideration of government action against allegedly indecent programming must take account of the fact that such speech is protected under the First Amendment. Moreover, in making indecency determinations, context is key. The Commission evaluates the facts of a particular complaint based upon the *actual* words and language used during the broadcast. *See Indecency Policy Statement.* Thus, in applying the indecency definition, we ascertain the *meaning and context* of those words and language as used during the broadcast, not other material broadcast on other occasions. As the Supreme Court has emphasized, indecency determinations must be confined to the specific facts of a particular broadcast. *FCC v. Pacifica Foundation*, 438 U.S. 726, 742 (1978)(indecency must be evaluated in context, and cannot be adequately judged in the abstract). Thus, Mr. Smith's generalized contentions concerning the *Mancow* program do not warrant reconsideration of our February 5, 2002 denial of his complaint.

IV. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 405 of the Communications Act of 1934, as amended, ("Act")[13] and Section 1.106 of the Commission's Rules,[14] the request for reconsideration filed March 1, 2002 by David Edward Smith IS HEREBY DISMISSED as untimely with respect to our January 28, 2002 and January 29, 2002 letters denying his indecency complaints, File Nos. EB-01-IH-0409 and EB-01-IH-0357.

10. IT IS FURTHER ORDERED that, pursuant to Section 405 of the Communications Act of 1934, as amended, ("Act")[15] and Section 1.106 of the Commission's Rules,[16] the request for reconsideration filed March 1, 2002 by David Edward Smith IS HEREBY DENIED with respect to our February 5, 2002 letter denying his indecency complaint, File No. EB-01-IH-0315.

11. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to David Edward Smith, 10940 S. Prospect Avenue, Chicago, Illinois, 60643, to J. Scott Enright, Vice President, Associate General Counsel and Assistant Secretary, Emmis

[13] 47 U.S.C. § 405.

[14] 47 C.F.R. § 1.106.

[15] 47 U.S.C. § 405.

[16] 47 C.F.R. § 1.106.

Radio License Corporation, 40 Monument Circle, Indianapolis, Indiana 46204 and to Emmis's counsel, Eve J. Klindera, Esq., Wiley Rein & Fielding LLP, 1776 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau